Lim Kheng Boon & Ors v Public Prosecutor

COURT OF CRIMINAL APPEAL (SINGAPORE) — CRIMINAL APPEAL NO 2 OF 1988
SINNATHURAY, THEAN AND YONG PUNG HOW JJ
2 APRIL 1991

Criminal Law — Trafficking — Trafficking in diamorphine — Possession, custody and control — Presumption of trafficking — Rebutting of presumption — Misuse of Drugs Act (Cap 185, 1985 Ed), ss 17, 18 & 21

Words and Phrases — 'Traffic' — Misuse of Drugs Act (Cap 185, 1985 Ed)

Evidence — Admissibility — Accused persons charged separately — Whether evidence of common intention admissible

The three appellants were tried for trafficking in 1,777g of diamorphine. The evidence revealed that the first appellant was employed by one Ah Seng to take 'something' in a plastic bag to the third appellant. The bag was transported to the third appellant by the first and second appellants in the second appellant's car. The bag was subsequently recovered from the third appellant's car and found to contain 1,777 g of diamorphine. The appellants were convicted and they appealed against their convictions. The first and third appellants contended that inadmissible evidence showing a common intention between themselves and the second appellant was adduced at the trial.

Held, dismissing all three appeals:

(1) The evidence was incontrovertible that each of the appellants, at different material periods of time, had possession, custody and control of the plastic bag.

(2) The bag was placed in the second appellant's car with his knowledge and consent. Whether he placed it there or not was immaterial. Applying s 21 of the Misuse of Drugs Act, the second appellant was presumed to have the diamorphine in his possession.

(3) The first appellant knew that the plastic bag was in the second appellant's car. He took the bag from the second appellant and placed it in the boot of the third appellant's car. Applying s 18(1) of the Act the first appellant was presumed to have the diamorphine in his possession.

(4) The third appellant allowed the first appellant to place the bag in the boot of his car. He drove off with the bag in his car. Applying s 21 of the Act he was presumed to have the diamorphine in his possession.

(5) Applying s 18(2) of the Act each of the appellants was presumed to have known the nature of the drugs and applying s 17 of the Act they were presumed to have known that the diamorphine was for the purpose of trafficking.

(6) The term 'traffic' in the Act meant, inter alia, to transport. Each of the appellants was at the material times transporting the diamorphine from one place to another.

(7) It was fallacious to say that in a case where two or more accused were separately charged but jointly tried and no allegation of common intention subsisting between them was made in the charges, evidence of a common intention or arrangement between them in relation to the charges was not admissible. If such evidence emerges in the course of the trial, there was no principle of law to say that the court could not make a finding of fact of such common intention or arrangement.

Cases referred to

1 *Wong Kee Chin* v *PP* [1979] 1 MLJ 157 (folld)
2 *Poon Soh Har & Anor* v *PP* [1977] 2 MLJ 126 (distd)

Legislation referred to

Misuse of Drugs Act (Cap 185, 1985 Ed) ss 17, 18, 21

Sant Singh (Aqbal Singh with him) for the first appellant.
JB Jeyaretnam for the second appellant.
Peter Pang for the third appellant.
Sowaran Singh (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Thean J (delivering the judgment of the court): The three appellants above named were separately charged in the High Court under s 5 of the Misuse of Drugs Act (Cap 185, 1985 Ed) ('the Act') for trafficking in drugs on 8 August 1984. The charges may be summarized briefly as follows. The charge against the first appellant was that he trafficked in four packets containing not less than 1,777g of diamorphine on 8 August 1984, at 8.30pm at Race Course Road, Singapore; the charge against the second appellant was that he trafficked in the same quantity of diamorphine on the same day and at the same time at Race Course Road and Kinta Road, and the charge against the third appellant was that he trafficked in the same quantity of diamorphine on the same day between 8.30pm and 8.45pm from Race Course Road to Braddell Road, Singapore. All the three of them, though charged separately, were tried jointly and at the conclusion of the trial they were each found guilty of the charges and were convicted and sentenced to death. Against the convictions, this appeal was brought and at the conclusion of the hearing we dismissed it. We now give our reasons.

The relevant events on 8 August 1984 as established by the prosecution were as follows. On that day, the first appellant was under surveillance by a party of narcotics officers led by Senior Narcotics Officer Lim Chei Yoo. They took up their respective positions in the vicinity of the shophouse called Hoover Photo Studio at 334 Balestier Road. At 6.25pm, the first appellant and one Ah Ho came out of the passageway of Hoover Photo Studio and boarded a taxi, which took them to Race Course Road. The taxi stopped opposite a block of flats No 35, and both of them alighted and went to apartment #01-175 of Block 37, Race Course Road. They were trailed by some of the narcotics officers who continued their surveillance on the first appellant. At about 7.40pm, the first appellant was seen coming out of the apartment and leaving in a taxi. A short while later, Ah Ho came out of the apartment and stood at the side of Race Course Road.

At about 7.50pm a Honda Accord, No EL 9991 H, driven by the third appellant arrived and stopped at the side of the road in front of Block 37. The third appellant got out of the car and spoke to Ah Ho. At about 8.05pm Ah Ho walked towards Rangoon Road, and a while later, the third appellant drove his car and parked it in front of Block 39. He alighted and stood near his car, apparently waiting. At about 8.25pm the first appellant was seen by the narcotics officers arriving in a Malaysian registered car, RX-7 Mazda, No JAJ 1111, driven by the second appellant. The first appellant alighted from the car while the second appellant remained inside. The first appellant then walked towards Block 37 and approached the third appellant; they engaged in conversation. The first appellant then walked to the junction of Kinta Road and Race Course Road and there he waved to the second appellant to drive the car into Kinta Road, which the second appellant did. The first appellant then walked to Kinta Road. At that time, the third appellant also began to walk to Kinta Road. When the first appellant reached the second appellant's car the second appellant was seen handing over to the first appellants a plastic bag. After receiving the bag, the first appellant walked back to Race Course Road. The second appellant then reversed his car into Race Course Road and drove off. At about that time, the third appellant walked back from Kinta Road to his car in Race Course Road, opened the boot of the car and stood at the driver's door which was also opened. The first appellant was seen walking towards the third appellant, and he lifted the bag to show it to the third appellant. When the first appellant reached the third appellant's car, he put the plastic bag into the boot, closed the boot and got into the front passenger seat of the car. The third appellant then drove off. After a short distance, the first appellant alighted from the car and the third appellant then continued the journey alone. He was trailed by the narcotics officers. He turned into Braddell Road and drove along until he reached the junction of Braddell Road and Lorong Chuan, where he was stopped and arrested by the narcotics officers. He was asked to open the boot of his car which he did, and the officers found therein a plastic bag with two blocks inside and two blocks lying outside the bag. The blocks were wrapped in masking tape.

Later, some narcotics officers were despatched to the house at Balestier Road and they arested the first appellant. He was taken to the Central Narcotics Bureau. There, the first appellant and the third appellant met; the third appellant said in Hokkien that the first appellant was the one who put the plastic bag into the boot of his car, which the first appellant admitted. At that juncture, two narcotics officers arrived in the car, Mazda RX-7, No JAJ 1111, with the second appellant and another Malay, Rahimudin bin Abdul Rahman, whom they had arrested at the Woodlands Customs Checkpoint at about 9.50pm. The first appellant then said in Hokkien that the second appellant was the one who sent him to Race Course Road in the car No JAJ 1111 and who gave him the plastic bag. When questioned by SNO Lim, the second appellant said in Malay that he brought the first appellant in his car to Race Course Road and gave him the plastic bag. He also admitted that he put the plastic bag on the rear seat of his car and covered it with a jacket.

By the following morning, a senior narcotics officer, Jamaluddin bin Salleh, had taken three statements from the three appellants respectively under s 122(6) of the Criminal Procedure Code (Cap 68, 1985 Ed). The statements of the second and third appellants were not challenged and were admitted in evidence. The first appellant challenged the admissibility of the statement, and after a trial within a trial, the High Court admitted the statement holding that the statement was given voluntarily by the first appellant.

Very briefly their statements were as follows. The first appellant said he was employed by one Ah Seng to bring 'something' to the third appellant for M$10,000 (which he subsequently corrected to M$1,000) and he was to wait at Rochor Road to be picked up by a car No JAJ 1111. The driver of that car handed him a plastic bag at Race Course Road which he in turn handed over to the third appellant; he did not know the contents of the bag. After that, he returned to Balestier Road where he was arrested. The second appellant said that the first appellant was known to him as 'Tan'. He met Tan at Rochor Shopping Complex; Tan asked him for a favour, that is, to send Tan to Race Course Road to see a friend, which the second appellant agreed. On arrival at Race Course Road, the first appellant got out of his car carrying a plastic bag. After that he proceeded to Johore Bahru but was arrested at Woodlands Customs Checkpoint. The third appellant said he had a friend Lai Huat who lived in Penang and who used to come to Singapore to gamble. On 7 August 1984 Lai Huat telephoned him and asked him to get in touch with Ah Ho and to give the latter any assistance that might be needed. Accordingly, he got in touch with Ah Ho and they arranged to meet at a coffeeshop in Ang Mo Kio. There he met Ah Ho and also the first appellant. Ah Ho introduced the first appellant to him. On the following day, he received another call from Lai Huat who asked him to call Ah Ho again and see what the latter wanted him to do. He called Ah Ho and was asked to meet Ah Ho at Block 37, Race Course Road that evening. Accordingly, he went there at about 7.30pm and met Ah Ho, and talked to him. He was then asked by Ah Ho to wait there for the first appellant. Later, he saw the first appellant arriving in a car, Mazda RX-7, No JAJ 1111 driven by another person. He spoke to the first appellant who also asked him to wait. He then saw the driver

of the Mazda RX-7 driving the car to Kinta Road, and being curious he went there. But the first appellant asked him to wait at his car and to open the boot. He therefore went back to his car, opened the boot and got into his car. Very shortly, the first appellant came; he got into the car and asked him (the third appellant) to drive off. He did so, and after a short distance, the first appellant asked him to stop as the first appellant wanted to speak to Ah Ho. He then dropped the first appellant just before a junction and drove off. At the junction of Braddell Road and Lorong Chuan he was arrested.

The four blocks, which were found in the boot of the third appellant's car, No EL 9991H, were opened up and were found to contain plastic bags which in turn contained some white substance. The quantity of white substance was subsequently analyzed and found to contain not less than 1,777g of diamorphine.

At the close of the case for the prosecution, the High Court held that a case had been made out against the appellants which, if unrebutted, would warrant their convictions. Accordingly, all the three appellants were called upon to enter upon their respective defences; and all of them gave evidence on oath. The sole defence, which was common to all the three appellants, was that they did not know that the plastic bag contained diamorphine.

The evidence of the first appellant was this. He is a Malaysian living in Penang. In July 1984, he lost more than M$10,000 in gambling and borrowed a total sum of M$10,200 from one Ah Seng, whose name is Teoh Poh Yeng ('Teoh'). He could not repay the loan on the date as promised. Teoh asked him to go to Singapore to pick up something for which he would be paid M$1,000, which would be deducted from the loan; but if he refused to do so, the loan would have to be paid in full. He did not know what he was to pick up. All the same he came to Singapore.

He admitted that he knew Ah Ho. On 7 August 1984 Ah Ho introduced him to the third appellant. They met at a coffeeshop in Ang Mo Kio, where they talked about gambling and food. The meeting then ended and he did not go out that night.

On the following evening, he met Teoh at Bencoolen Hotel. Teoh drove him in a Mercedes Benz to Rochor Shopping Centre, and there Teoh introduced him to the second appellant. Teoh told him that Teoh had a packet of things in the second appellant's car and asked the second appellant to drive him (the first appellant) to Race Course Road, where he (the first appellant) was to hand the packet to the third appellant and to inform the third appellant that it was Ah Sam who wanted the third appellant to keep the packet for him (Ah Sam). Accordingly, the second appellant drove the first appellant to Race Course Road where the first appellant handed the packet to the third appellant. He then boarded the car of the third appellant and suggested to the third appellant that they should go for some food. After travelling a short distance, the third appellant suggested that he (the first appellant) should ask Ah Ho to join them and that the third appellant would return and pick them up later. Accordingly, the first appellant alighted from the car and went back to Block 37 to look for Ah Ho. But he could not find Ah Ho, and he then took a taxi and returned to the house at Balestier Road where he was arrested at about 10pm.

The second appellant is a Malaysian living in Johore Bahru; he was a textile trader and a car broker. In his defence he also said that he was set up by Teoh whom he had met in 1982 and to whom he had previously sold a few cars as a broker. He got to know Teoh through those transactions. On 8 August 1984, at about 3pm while he was in Johore Bahru, he received a telephone call from Teoh who wanted him to come to Singapore to bring a few radio cassettes to Malaysia. The reason for this was that the second appellant was a customs informer and could get a rebate on customs duty on those items. He agreed to do so but could only come to Singapore at about 7pm. Teoh told him to wait at Rochor Shopping Centre coffeeshop. He met Teoh there and after a discussion with Teoh he did not agree at that time to take the radio cassettes in his car as there were seven boxes of them and his car was small, and also he dared only bring to Johore Bahru one radio cassette. The idea of taking radio cassettes to Malaysia was abandoned. Teoh then asked him to allow Teoh to put a bag in his car, and he agreed. He handed to Teoh the keys to his car and saw Teoh taking a plastic bag to his car, but he did not know in which part of his car Teoh had placed the plastic bag. They arranged to meet again at the coffeeshop. He then went shopping, and at about 8pm he met Teoh again, and on this occasion the first appellant was with Teoh. Teoh asked him to take the first appellant to Race Course Road and to give to the first appellant the bag Teoh had put in his car. He agreed and gave a lift to the first appellant to Race Course Road. When they arrived at Race Course Road, the firs appellant alighted and asked him to wait for a moment. As parking was prohibited at the spot where he was, he drove the car to another spot near Kinta Road, where he waited for the first appellant. Later, the first appellant came and told him to hand over the plastic bag which he did. Thereafter, he left and drove to Rochor Shopping Centre via Serangoon Road to pick up his friend Rahimuddin to return to Johore Bahru. At the Woodlands Customs Checkpoint, he and Rahimuddin were stopped and arrested; he was not told the reason for his arrest. He said that he did not know what was in the plastic bag that Teoh had put in his car

and that he had never concerned himself with what was in the bag.

The third appellant in his defence said that his friend in Penang called Lai Huat telephoned him a couple of days before 8 August 1984, saying that a good friend called Ah Ho would be coming to Singapore on the following day. Lai Huat asked him to look after Ah Ho and to collect money form Ah Ho which was to be kept for Lai Huat. Accordingly, on the following day he got in touch with Ah Ho and he met Ah Ho that afternoon at about 3.30pm at a coffeeshop in Ang Mo Kio; Ah Ho had with him at the time a friend, the first appellant. There they talked about horse-racing and food. They parted company that afternoon.

On the following day, 8 August 1984, at about 7pm he spoke to Lai Huat on the telephone and after that he telephoned Ah Ho to invite him out to a nightclub for a drink and also to collect Lai Huat's money from him. Ah Ho said he was free to go out but at that time he was waiting for a friend. Ah Ho asked him to go to Block 37 Race Course Road and wait there. That he did. He suggested that they should go for dinner but Ah Ho said that he was not hungry and also informed him that he had not got the money for Lai Huat yet. Ah Ho then asked him to wait a while longer as the first appellant was coming and that when the first appellant came they would go for a drink. After some further conversation, Ah Ho left. The third appellant then drove his car to a parking lot near Block 39 and waited by the side of his car. There was no sign of Ah Ho, and just as he was about to leave he saw the first appellant arriving in a Mazda RX-7 driven by another person. He saw the first appellant walking hurriedly towards Block 37. They met and engaged in conversation; the first appellant asked him whether he could give him (first appellant) a lift to Balestier Road; he agreed. The first appellant asked him to wait as he wanted to collect his clothes from the Mazda RX-7. The first appellant then went to the Mazda RX-7 and came back with something which he put in the boot of the car. The first appellant then got into the passenger's seat and asked him to drive to Balestier Road. The third appellant drove off. After a short distance, he asked the first appellant to join him and Ah Ho to go to a nightclub for a drink at about 10.30pm. The first appellant agreed but said that in the meanwhile he wanted to talk to Ah Ho and asked to be let down. The third appellant thereupon dropped the first appellant and also told the first appellant that he would come back to Race Course Road to fetch the first appellant and Ah Ho later. The first appellant then said that he would collect his clothes which were in the boot of the car when the third appellant came back. The third appellant then drove off with the intention of going to his gambling den in Ang Mo Kio, Avenue 3, but on the way he was arrested at the junction of Braddell Road and Lorong Chuan.

At the close of the case, the learned trial judges found that each of the appellants had, at the material time, possession, custody and control of the plastic bag that contained the quantity of diamorphine in the charge, and held that the statutory presumptions provided in ss 17, 18(1) and (2), and 21 of the Act applied to each one of them and the burden was on them to rebut the presumptions on a balance of probabilities. The learned trial judges said:

> On the evidence before us, we have no doubt whatever that between the time when the yellow plastic bag containing the heroin was put into the car belonging to the second accused and the time he handed over the said bag to the first accused, the second accused had possession, custody or control of the said bag. We are also of the view and we find that during the same period, the first accused was in joint possession custody or control of the said bag. After the first accused took the plastic bag from the second accused at Kinta Road, he was then in sole possession, custody or control thereof until he put it in the boot of the third accused's car. Thereafter or at least from the time the first accused alighted from the accused's car shortly after, the third accussed was in possession, custody or control of the said bag.
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> Therefore, the presumption provided by ss 18(1) and (2) and 21 applied to each of the said accused unless he was able to prove that on a balance of probabilities he did not know what was in the plastic bag.

The learned trial judges then proceeded to analyze and consider the evidence adduced by the appellants, and in the end rejected their evidence and came to the conclusion that each of them had not rebutted the statutory presumptions. They also found that each of them participated in the delivery of the plastic bag that contained the diamorphine on the evening of 8 August 1984 and that they each knew what was in the bag. The learned trial judges said:

> Having carefully considered the evidence of the three accused, we have reached the conclusion that they have not discharged the burden of proof that they did not know that the bag contained heroin. We find that the first accused came down from Penang to carry out the delivery of the heroin, that his meetings with Ah Ho and the third accused were directed to that end. We do not believe that he made two trips to Singapore without knowing what he was supposed to do nor do we think that he believed that he was being asked to deliver gold ware for Ah Seng. We also find that he waved to the second accused to drive into Kinta Road and he also held up the plastic bag at the third accused and in this respect we prefer the evidence of ANO Lee to that of the first accused. As regards the second accused, we find that he came down from Johore Bahru for the same purpose as we are unable to accept his testimony that the purpose was to take a few cassette radios into Malaysia. As the for third accused, we find that he was part of the chain of delivery of the heroin. We are unable to accept his evidence that his presence at Race Course Road on that fateful night was for the purpose of taking Ah Ho out to

dinner. We do not believe that his meeting with Ah Ho and the first accused on 7 August 1984 was innocuous or that Lai Huat would telephone him on so many occasions just to give him racing tips.

The defence of each of the three accused was that each did not know what he was transporting. They did not adduce any specific evidence to rebut the statutory presumption that they were in possession of the bag of heroin for the purpose of trafficking. Further, there was undisputed evidence that each of the accused had transported the bag of heroin.

We are in entire agreement with the findings made by the learned trial judges. In our judgment, the evidence is incontrovertible that each of the appellants, at different material periods of time, had possession, custody and control of the plastic bag, which contained not less than 1,777g of diamorphine, the subject matter of the respective charges. In the first place, that bag was, at the material time, placed on the rear seat of the second appellant's car, the Mazda RX-7, No JAJ 1111, with his knowledge and consent — whether he himself placed it there or not is immaterial — and he drove the car, with the first appellant seated next to him, to Race Course Road , and subsequently, at the beckoning of the first appellant, drove the car to Kinta Road. Applying s 21 of the Act, the second appellant was presumed to have the quantity of diamorphine in his possession. Secondly, the first appellant knew that the plastic bag was in the second appellant's car; after the second appellant had driven the car to Kinta Road, he took the bag from the second appellant and brought it to the third appellant's car, the Honda Accord, No EL 9991H, at Race Course Road and placed it in the boot of that car. Applying s 18(1) of the Act, the first appellant was presumed to have that quantity of diamorphine in his possession. Thirdly, the third appellant, who was waiting at the side of the car at Race Course Road, on seeing the first appellant approaching him, opened the boot of his car for the first appellant to place the bag in the boot. He then drove off, and after the first appellant had alighted, he continued the journey with the bag in the boot of his car until he was arrested at the junction of Braddle Road and Lorong Chuan. Applying s 21 of the Act again, he was presumed to have the same quantity of diamorphine in his possession. Applying s 18(2) of the Act, each of them was presumed to have known the nature of the drugs. Section 17 of the Act is also applicable and each of them was presumed to have that quantity of diamorphine in his possession for the purpose of trafficking therein. The term 'traffic' in the Act means, inter alia, to transport and each of them was at the material time transporting the quantity of diamorphine from one place to another. The learned trial judges considered the evidence of each of them separately and came to the conclusion that they each had failed to discharge the burden of rebutting the statutory presumptions.

In *Wong Kee Chin* v *PP*[1] at p 161, this court said:

When it is proved that the quantity of diamorphine which the accused person was transporting (in the dictionary sense of the term) was two or more grams, a rebuttable presumption arises under s 17 that the accused had the said controlled drug in his possession for the purpose of trafficking. Proof of the act of transporting plus the presumption under s 17 would constitute a prima facie case of trafficking which if unrebutted would warrant his conviction. In those circumstances the burden of proof would clearly shift to the accused and he would have to rebut the case made out against him. The rebuttal will depend upon the evidence placed before the court. If he can convince the trial court by a preponderance of evidence or on the balance of probabilities that the drug was for his own consumption he would be entitled to an acquittal. Factors such as the type of 'transporting', the quantity involved, whether or not the accused is an addict, would be a question of evidence and the inferences to be drawn from the totality of the evidence before the court.

On the evidence none of them had discharged the burden of rebutting this prima facie case on a balance of probabilities. Counsel for the appellants mounted multiple arguments in this appeal against the decision of the learned trial judges but none of the arguments succeeded. In so far as they were directed to show that the findings of fact made by the learned trial judges were against the weight of evidence or were not supported by any evidence or based on wrong inferences, they have no merit whatsoever. We can find no reason to criticize these findings. Indeed, as we have said, we agree with them. We consider it necessary to deal with only the following specific arguments raised.

One of the arguments raised by counsel for the first appellant and also by counsel for the third appellant was put in this way. The three appellants were each charged with having committed separate and distinct offences; each charge related to trafficking in the same quantity of diamorphine at different spots on the same evening. They were not charged with having committed the offence in furtherance of a common intention subsisting between them or having conspired with each other to commit the offence of trafficking in diamorphine. The learned trial judges, however, made findings of fact implying a common intention or conspiracy on the part of the appellants or that they were acting in concert. In particular, they found that initially the first appellant and the second appellant had joint possession, custody and control of the diamorphine and later the first appellant and the third appellant had joint possession, custody and control of the drugs; that 'the first appellant came down from Penang to carry out the delivery of the heroin, that his meeting with Ah Ho and the third appellant were directed towards that end'; that prior to taking delivery of the plastic bag containing the diamorphine from the second appellant, the first appellant waved to him to drive his car to Kinta Road; that the first appellant after he had got the plastic bag from the

second appellant and as he was approaching the third appellant 'held up the plastic bag' to show it to the third appellant; that the second appellant came from Johore Bahru to deliver the drugs, and finally that the third appellant was 'part of the chain of delivery of the heroin'. It was submitted that these findings were erroneous in law, because the prosecution could not, on the separate charges preferred against the appellants, mount a case against them on the basis that there was a common intention in furtherance of which the offence of trafficking in drugs was committed or that there was a conspiracy by the three appellants to commit the offence of trafficking in drugs. Counsel further submitted that on the basis of the charges any evidence, if adduced by the prosecution, showing a common intention or a conspiracy to commit the offence would be inadmissible. In support, counsel relied on *Poon Soh Har & Anor* v *PP*,[2] which is a decision of this court. In particular, counsel relied on the following passage of the judgment at p 127:

> In our judgment the evidence in respect of past criminal activities of the appellants was inadmissible. It offended against the principle laid down in *Makin* v *Attorney-General of New South Wales* [1894] AC 57, in that first, it plainly tended to show that the appellants had been guilty of criminal acts other than that with which they were charged, for the purpose of leading to the conclusion that they were persons likely from their criminal conduct or character to have committed the offence for which they were being tried, and secondly, it could not be said to be relevant to any issue in the case. Because of the precise definition of 'traffic' in s 2 of the Act which is restricted to the commission of a number of specific acts, evidence of such past acts was irrelevant as it could not prove the offence of trafficking on the day and time in question. The fact that the appellants had trafficked in heroin in the past did not mean that they were trafficking when arrested. Evidence of trafficking in heroin in the past merely raised the suspicion that they were having the heroin for purposes of trafficking and did not prove that they 'did traffic' on the day in question. The admission of evidence of past criminal acts could not be justified on any ground and should have been rejected.

We were unable to accept this argument. It is fallacious to say that in a case, such as the instant one, where two or more accused are separately charged but jointly tried and no allegation of common intention subsisting between them is made in the charges, evidence of a common intention or an arrangement between them in relation to the charges is not admissible. In proving the charges against the accused evidence may emerge which suggests or shows the existence of a common intention or an arrangement with reference to the offence with which each of them is charged. If such evidence does emerge, there is no principle of law to say that the court cannot make a finding of fact of such common intention or arrangement which is relevant to the charges brought against the accused. In the instant case, as the evidence shows, each of the appellants was found to be in possession of the plastic bag which contained not less than 1,777g of diamorphine and was transporting that bag from one place to another. There is therefore a *prima facie* case of traficking in that quantity of diamorphine which they had to rebut. In seeking to rebut this case, they each gave evidence. Among other things, evidence was given as to (i) the meeting which the first appellant had with the third appellant and Ah Ho, (ii) the meeting which the first appellant had with the second appellant, (iii) the first appellant's and the second appellant's trip to Singapore and the purposes of their trips, and (iv) the relevant events which took place at Race Course Road at the material time. The learned trial judges having examined and considered such evidence in the light of other evidence adduced before them made the following findings: first, that the first appellant 'came down from Penang to carry out the delivery of heroin' and his meeting with Ah Ho and the third appellant was directed to that end; secondly, that the second appellant came down from Johore Bahru for the same purpose, and, thirdly, that the third appellant was 'part of the chain of delivery of the heroin'. There is nothing erroneous in respect of such findings.

The case of *Poon Soh Har* v *PP*[2] has absolutely no relevance here. In that case there were two accused and both of them were jointly charged with trafficking in drugs in furtherance of a common intention of both of them. To establish the charge, the prosecution tendered evidence of past criminal acts of the accused which has no connection with the charge brought against the accused at the time. That clearly was wrong. This court held that the evidence relating to those criminal acts was inadmissible and it is in that context that the passage of the judgment which we have just quoted should be understood. Nothing of that kind had occurred in the instant case.

Next, it was argued by counsel for the third appellant that on the basis of the first appellant's evidence, which the learned trial judges said had incriminated the third appellant, they ought not to have convicted the third appellant of the charge of trafficking; he was at most guilty of a charge of possession of the drugs. The first appellant in his evidence said, among other things, that the first appellant was asked by Teoh to hand the plastic bag to the third appellant and to inform the third appellant that he was to keep it for Ah Sam. Hence at that time when the third appellant received the bag and transported the bag in his car he was transporting it for the purpose of safekeeping and not for the purpose of delivery to any other person. On that basis, the third appellant was not trafficking in the quantity of drugs as alleged. We were unable to accept such an argument. First, it was never the defence of the third appellant before the learned trial judges that he received the plastic bag for the purpose of keeping it for Ah Sam. No

evidence to this effect was given by him. On the contrary, in cross-examining the first appellant, counsel for the third appellant suggested that that was not true. Secondly, the evidence that Teoh had asked the first appellant to inform the third appellant that the latter was to keep the plastic bag for Ah Sam is hearsay and is not evidence of the truth of the content of that statement. This evidence was not accepted by the learned trial judges and we can see no reason for treating it otherwise.

We now turn to the last complaint made by counsel for the third appellant. It was submitted that the prosecution had Ah Ho as a material witness but failed to call him to give evidence, and in consequence there was a gap in the prosecution evidence adduced against the third appellant. The learned trial judges, so counsel submitted, found that the first appellant came down from Penang to carry out the delivery of the heroin and that his meeting with the third appellant and Ah Ho was directed to that end, and that the third appellant 'was part of the chain of delivery of the heroin'. There was no evidence to support such finding; Ah Ho was not called as a witness. There is therefore a gap in the prosecution's case and it is the duty of the prosecution to close this gap. We rejected this argument. There was no gap in the case against the third appellant. He was found to have in the boot of his car the quantity of heroin, in respect of which he was charged and he was driving that car from Race Course Road to the junction of Braddell Road and Lorong Chuan where he was arrested. Applying the statutory presumptions, there was a prima facie case of trafficking in the quantity of heroin and he had not rebutted this case. His evidence was not accepted by the learned trial judges and, in our view, rightly. Accordingly, we dismissed the appeal.

Appeal dismissed.

Solicitors: *Sant Singh & Partners; JB Jeyaretnam & Co; Peter Pang & Co.*

Reported by *Mathavan Devadas*

Arab Banking Corp v United Overseas Bank Ltd

COURT OF APPEAL (SINGAPORE) — CIVIL APPEAL NO 111 OF 1988
YONG PUNG HOW CJ, THEAN AND CHAO HICK TIN JJ
28 MARCH 1991

Land Law — Mortgages and charging orders — Mortgaged property sold under statutory power of sale — Whether mortgagee obliged to hold surplus moneys from the sale on trust for a subsequent incumbrancer — Whether appellants were subsequent incumbrancer of the property as their charging order absolute was not registered against the property with the Registry of Deeds — Conveyancing and Law of Property Act (Cap 61, 1985 Ed), s 26(3) — Registration of Deeds Act (Cap 269, 1989 Ed), ss 2 & 4 — Rules of the Supreme Court 1970, O 50 r 1

Bankruptcy — Creditor's rights under execution — Execution creditor having no notice of act of bankruptcy or of bankruptcy proceedings against debtor — Statutory power of sale of mortgaged property — Sale completed and proceeds received by mortgagees before debtor adjudicated bankrupt — Whether creditor's claim to surplus sum from sale affected by bankruptcy of debtor — Bankruptcy Act (Cap 20, 1985 Ed), s 49

Banking — Set-off — Sums due and payable to respondents under guarantee — Mortgaged property sold by respondents — Surplus from sale — Whether respondents entitled to set-off debt against surplus

The property in question was beneficially owned by the debtor although the legal estate thereof was vested in another person called Sim. Sim executed two mortgages dated 6 July 1983 and 7 June 1984 respectively in favour of the respondents to secure his account with the respondents. Between the dates of these two mortgages, the debtor executed two guarantees: one dated 2 March 1984 in favour of the appellant and the other dated 16 March 1984 in favour of the respondents, both guarantees were to secure the due payment of all moneys and liabilities owing from a company called City Securities (Pte) (now in liquidation) ('City Securities'). City Securities became insolvent and the appellants instituted legal proceedings against the debtor for recovery of the moneys owed by City Securities to the appellants. Judgment was entered and pursuant thereto the appellants instituted execution proceedings against the debtor and obtained a charging order nisi on the property on 7 August 1986 which charging order was registered against the property with the Registry of Deeds on 12 August 1986. On 3 October 1986 the appellants obtained a charging order absolute and appointed a receiver on 10 October 1986 to enforce the charge.

On 21 October 1986 the respondents exercised their power of sale over the property and completed the sale on 22 January 1987. The proceeds were applied by the respondents in settlement of the amount due to them under the mortgages and costs and other expenses incurred and there remained a surplus. On 27 January 1987 the debtor committed an act of bankruptcy and on 29 January 1988 a receiving order and an adjudication order were made against the debtor. It appeared that neither the appellants nor the respondents had any notice of the debtor's act of bankruptcy or the bankruptcy proceedings taken against him at any time up to the date when the receiving and adjudication orders were made against him.

The appellants claimed the surplus moneys on the ground that they held a charge on the property and that under s 26(3)